

Hess Mechanical Corporation and Sheet Metal Workers International Association, Local 100, AFL-CIO. Case 5-CA-24162(E)

March 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On August 16, 1995, Administrative Law Judge David S. Davidson issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Applicant filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the application of the Applicant, Hess Mechanical Corporation, Upper Marlboro, Maryland, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

MEMBER COHEN, concurring.

I agree with my colleagues' denial of the Employer's application under the Equal Access to Justice Act (EAJA). The judge found that material issues of credibility required resolution in the underlying unfair labor practice proceeding, and that the General Counsel was substantially justified in proceeding to trial.

For me, this case is a close one and nearly warrants the granting of an award under EAJA. In the underlying unfair labor practice case, the judge concluded that employee Darr had been discharged because of low productivity. During the precomplaint investigation of that case, Darr gave an affidavit to the Regional Office. In that affidavit, Darr failed to mention the fact that he had received, and acknowledged, a written warning for poor productivity about 3 weeks prior to his discharge. Subsequently, the Employer submitted to the Regional Office a copy of the written warning. So far as the record shows, the Regional Office did not then go back to Darr and obtain a supplemental affidavit about the warning.

In these circumstances, it seems to me that prosecutorial discretion might well have been exercised against issuance of complaint. However, that is not the issue. Under Section 3(d), prosecutorial discretion is correctly vested in the General Counsel. Further, EAJA does not take that discretion away. It sim-

ply imposes a monetary price if the complaint is not substantially justified. As noted above, the instant case comes perilously close to that line. I am willing to say, in this case, that the line was not crossed. The Region did not know, to a certainty, that the warning had been issued. However, it is somewhat troublesome that the Region apparently did not obtain a supplemental affidavit from Darr in an effort to resolve the factual issue concerning the warning.

In these times of severe budgetary restraints on the Board, I hope that the General Counsel will be vigilant to ensure that the cases which are brought are indeed worthy of prosecution. Doing so will ensure the wise use of our resources and not having to expend those resources on EAJA awards.

Steven L. Sokolow, Esq., for the General Counsel.

Maurice Baskin, Esq., for the Respondent.

SUPPLEMENTAL DECISION

(Equal Access to Justice Act)

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Chief Administrative Law Judge. The charge in this case was filed on January 18, 1994,¹ and the complaint issued on March 8. On October 26 after a trial, Administrative Law Judge Bruce C. Nasdor issued his decision finding that the allegations of the complaint had not been established and recommending that the complaint be dismissed. On December 16, in the absence of exceptions, the Board issued its Order, affirming the judge's decision and dismissing the complaint.

On January 4, 1995, the Respondent filed an application of prevailing party for attorneys' fees and costs pursuant to the Equal Access to Justice Act (EAJA), including an objection to public disclosure of its net worth exhibit.² Thereafter, counsel for the General Counsel filed a motion to dismiss the application for the reason that the position of the General Counsel throughout the litigation of the unfair labor practice charges was substantially justified. Respondent filed a response thereto. On March 31, 1995, I denied the motion to dismiss without prejudice to renewal of the General Counsel's contentions in the answer.

Thereafter, counsel for the General Counsel filed an answer to the application, and Applicant filed its reply.

The answer raises two issues: whether the position of the General Counsel was substantially justified throughout the proceedings and whether the application is sufficient to determine the Applicant's eligibility under EAJA and the Board's Rules.

¹ All dates which appear in this decision were in 1994 unless otherwise indicated.

² In the absence of objection, the Applicant's request to withhold its net worth exhibit from public disclosure is granted, and the exhibit will be sealed.

I. FINDINGS AND CONCLUSION

A. *Eligibility*

Section 102.147(a) of the Board's Rules and Regulations provides that an application shall "state the number, category, and work location of employees of the applicant and its affiliates and describe briefly the type and purpose of its organization or business." Counsel for the General Counsel contends that the application fails to establish the Applicant's eligibility for an award and should be dismissed because it fails to state the number, category, and work locations of its employees and to state whether there are affiliates and subsidiaries of the Employer. In its reply, the Applicant states that Hess has no affiliates and that Hess has approximately 100 people performing plumbing, pipefitting, and sheet metal work in the Washington, D.C. metropolitan area. The Applicant asks to amend its application to state that Hess and its nonexistent affiliates employ a total of fewer than 500 employees, in addition to having a net worth of less than \$7 million. I find that the omission of the additional information from the initial application was not fatal and grant the request to amend the application. I find further that the application as amended is sufficient to establish the Applicant's eligibility to apply for an award of fees and other expenses under Section 102.143(c) of the Board's Rules and Regulations.

B. *Substantial Justification*

The complaint alleged that Respondent violated Section 8(a)(1) of the Act when a supervisor told an employee that he didn't want him talking about the Union during working hours, that he didn't want him talking about the Union anymore, that he had been warned about talking to employees about the Union, and that he didn't like him talking about the Union. The complaint also alleged that Respondent discharged Richard Darr because of his union and concerted activities.

In an affidavit given on January 31 before the complaint issued, Darr stated that he was hired to work on a construction site, that he was a member of the Sheet Metal Workers Union, that about 2 weeks after he started on the job in late November 1993, he began to talk to other employees about the Union throughout the workday, and that thereafter he tried to get some employees to sign union cards and gave cards to several workers. He also stated that John Blotner,³ the job foreman, approached him while he was sitting in the work area and told him that he did not want him distributing cards or talking Union during working hours. He stated that he believed that two other named employees⁴ were present and that they may have been talking about the Union when the foreman approached him. He stated that despite the warning he continued to talk to other employees about the Union when he had a chance and that about a week later with no one else present the foreman told him that he did not want him to talk about the Union anymore. He stated that he was not aware of any company policy concerning solicitation or distribution rules on company premises or during working hours. He stated that about a month later, after he had been

talking to three other employees about the Union in their work area, the foreman came to him alone and said that he had told him that he did not want him talking to the other employees about the Union and that Job Superintendent Long wanted to talk to him. He went to the office where Long told Darr that the foreman had told him that he did not want him talking to the other employees about the Union during the day and that he was going to have to let him go. Darr stated that he told Long that most of the time he talked to other employees during breaks and not during working time, and Long said that he didn't care and didn't want him talking Union to them.

The statements in Darr's affidavit supported the allegations of the complaint and were sufficient to establish a *prima facie* case.

After taking Darr's statement, the field examiner contacted the Applicant's counsel and asked to meet with and take affidavits from Foreman Blotner and Superintendent Long. The Applicant denied the request but made Blotner and Long available for oral interview by telephone while both were together. The record does not show what they said, but it can be inferred from the uncontested assertions in the pleadings and their testimony at the hearing that they denied the statements attributed to them by Darr and stated that Darr had been discharged because of his job performance. The Applicant also sent the field examiner a copy of a warning report concerning Darr dated December 17, 1993, and signed by Long. The report stated that Blotner and Long had previously spoken to Darr on more than one occasion about his productivity, that Long had received complaints about Darr from lead mechanics about the problem, and that substandard work would not be tolerated. Below Long's signature on the warning report form was a place for Darr to check whether he agreed or disagreed with the superintendent's statement and for him to write an explanation if he disagreed. There was a check mark in the box indicating that Darr agreed with the statement and what appeared to be Darr's signature below it.

On February 15 the field examiner sent the Applicant's counsel a letter asking, among other things, for documentation to show employees' daily output, if it existed, from November 1, 1993, to date and asking whether the Applicant had terminated any other employee during the past year for the same or similar reasons. The letter also renewed the request to take affidavits from Long and Blotner and stated: "Please take note that your client, by denying my request for Board affidavits, is not cooperating fully in our investigation. The General Counsel of the Board does not consider anything less than a Board affidavit, to be full and complete cooperation."

Thereafter, the Applicant's counsel submitted affidavits from five employees which in essence denied that Darr engaged in union activity on the job and stated that Darr's work performance had been poor. A Board agent took additional affidavits from them. One of them, DeReck Tingle stated that he had heard from another employee that Darr was from the Union and asked Darr to tell him a little about it. He stated further that the conversation was private and that he never saw Darr pass out union cards. However, he also stated that he thought that he heard him talk to a former employee about the Union. Another, John Bragg, stated that Darr never talked to him about the Union but that on one occasion when working with Darr, Bragg told him that he

³In his affidavit, Darr referred to his foreman as John Brown, an evident error on his part.

⁴John Bragg and Riley.

didn't believe that he was with the Union, and Darr took out his union card and showed it to him. He also stated that although Darr did not talk to him about the Union, he heard him talk to other employees about it and that Darr spoke loudly about it. He saw him show other employees something which may have been a card.

The General Counsel contends that the position of the General Counsel throughout the litigation was substantially justified because it rested on the affidavit and testimony of Richard Darr which, if credited, would have established the violations alleged in the complaint, because the Applicant refused to allow its supervisors to give sworn statements during the investigation to support its defenses, and because the judge's decision dismissing the complaint was based entirely on credibility resolutions.

In denying the motion to dismiss I noted that:

[I]t is unclear how much of the information on which the trial judge relied relating to Darr's performance on the job and the warnings to him was presented to the Regional Director before the complaint issued, in what form it was presented, and to what extent, if any, the evidence offered by the Respondent prompted further investigation as to those matters which were not covered in the affidavit Darr gave on January 31, in particular, the December 17 written warning, the check mark on that warning indicating that Darr agreed with the company statement, and the additional evidence as to Darr's job performance and complaints about it. The possibility remains that the Regional Director either should have known that Respondent had a valid defense to the allegation that Darr was discriminatorily discharged or should have investigated further to determine whether it did. See *DeBolt Transfer*, 271 NLRB 299, 303 fn. 7 (1984); *American Pacific Concrete Pipe Co.*, 290 NLRB 134 (1988).

While the warning report supports the Applicant's claim that it was dissatisfied with Darr's performance, it was issued some 2 weeks before his termination and of itself could not establish the cause of Darr's discharge. On further reflection, I am of the view that while obviously important, further investigation of it would have left credibility issues for resolution at a hearing.

Before the hearing, Darr's was the only sworn version of his conversations with Blotner and Long before the Regional Director, and contrary to the Applicant's contention, there was some corroboration for Darr's version of his union activity on the job.⁵ There was no credibility issue yet presented

by sworn statements over what Blotner and Long said to Darr before and at the time of his termination. One may speculate over whether the Regional Director would have resolved that credibility issue without a hearing even if the Applicant had made its two supervisors available to give affidavits during the investigation, but in the absence of sworn statements from them, the Regional Director was not required to discredit Darr and dismiss the charge.⁶

At the hearing, Darr did not concede that his job performance was mentioned at the time of his termination and he sought to minimize the warning and the reasons for it. By the end of the hearing, no material aspect of Darr's testimony remained uncontradicted, but it remained necessary to resolve the conflicts, particularly as to who was present and what was said at the termination interview, in order to decide the case. Although, as the Applicant contends, there were substantial reasons to discredit Darr, there were also plausible arguments for discrediting testimony presented by the Applicant in support of its defense, as counsel for the General Counsel argued in his brief to the trial judge. As a general rule, the General Counsel is found to be substantially justified in issuing and pursuing a complaint where credibility conflicts exist which can only be resolved after a hearing. *National Fire Protection*, 281 NLRB 624 (1986); *Leeward Auto Wreckers*, supra. The Applicant has cited no case, and I am aware of none, in which issuance and trial of a complaint has been found to lack substantial justification where credibility issues remained which had to be resolved to reach a disposition of the case, no matter how compelling the case for resolving them in the applicant's favor.

Accordingly, I conclude that resolution of the issues in this case required resolution of the credibility issues raised at the hearing and that the Regional Director was substantially justified in proceeding to the point of the judge's decision in this case. I shall recommend that the application be dismissed.

On these findings and conclusions and on the entire record, I issue the following recommended⁷

ORDER

The application for attorney's fees and expenses is dismissed.

⁶ *C.I. Whitten Transfer Co.*, 312 NLRB 28 (1993); *Leeward Auto Wreckers*, 283 NLRB 574 (1987), reversed in part and remanded 841 F.2d 1143 (D.C. Cir. 1988).

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ The affidavits of Tingle and Bragg.